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SUBJECT: Constitutional Debate 1: A Primer on the Contentious Issues

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11. (U) Summary: This cable is part one of a five part series on the contentious issues and political landscape surrounding the debate on Kenya's Harmonized Draft Constitution. This cable provides a snapshot of the outstanding contentious issues in the draft constitution: executive authority, devolution, judicial reform, and the Kadhi's courts. Cable two analyzes the influential voices, political position, and strategy of President Kibaki's Party for National Unity (PNU) in respect to the draft; an analysis of Prime Minister Raila Odinga's Orange Democratic Movement (ODM) follows in cable three. Cable four reports on the efforts of moderates, both within and outside of the two major parties, to broker a compromise between hardline ODM and PNU positions. Cable five assesses the dynamics of public opinion and special interest groups in the context of the upcoming national referendum on the draft constitution.

12. (SBU) Summary continued: Kenya's two main political parties are currently locked in tense negotiations over the draft constitution. Agreement must be found during the course of talks if the constitutional review and referendum process is to be peaceful and successful. The parties are far apart on how to vest power in a president or a prime minister, as well as the method of election. Differences also remain over devolved government, the judiciary, a recall provision for members of parliament, and Kadhi's courts. Kadhi's courts address only civil issues under sharia law where both parties are Muslims, but are opposed by some major Christian organizations. It remains unclear whether the parties will negotiate in good faith, or use political alliances to push parochial agendas. End summary.

13. (SBU) As debate on Kenya's draft constitution moves from the public sphere to Parliament, stumbling blocks to consensus are emerging in key areas. Both parties are fighting vigorously over the structure of the executive and the status of devolved government. The major parties agree on the framework of the judiciary and the inclusion of Kadhi's courts, but the two issues are contentious with domestic interest groups. The public comment period ending on December 17; as a result, many decisions will be made between the Committee of Experts (CoE), tasked with drafting the constitution, and Parliament, which must approve a draft before it proceeds to a national referendum.

14. (SBU) It is unclear whether the two Grand Coalition committees, the vehicle for major political parties to reach consensus on the draft, will continue negotiating after the public comment period ends. The next step in the process requires the CoE to deliver a new draft to the Parliamentary Select Committee (PSC) on January 7th. Party leaders could delay negotiations if they perceive a new draft strengthening their position. Meanwhile, interest groups will lose their ability to influence the CoE directly, and will be forced to rely upon Members of Parliament (MPs) to negotiate on their behalf. At the Parliamentary stage, a two-thirds vote is required to alter the draft constitution. The PSC and Parliament will be able to send the draft back to the CoE a total of two times before a final draft must be voted on by the entire parliament between mid-March and early April prior to a referendum.

15. (SBU) The Party of National Unity (PNU) and the Orange

Democratic Movement (ODM) have tasked the Grand Coalition Management and Technical Committees with negotiating a compromise. The six-member Technical Committee is most involved in the detailed negotiations, led by Justice Minister Mutula Kilonzo for PNU, and Odinga adviser Miguna Miguna for ODM. The inclusion of many politicians with presidential ambitions on the Management Committee could complicate negotiations. Currently Deputy Prime Minister Uhuru Kenyatta, Deputy Prime Minister Musalia Mudavadi, Agriculture Minister William Ruto, and Internal Security Minister George Saitoti are all rumored to be seeking higher office in 2012 or beyond, and may negotiate with an eye to personal advantage.

¶16. (SBU) Debate over the powers of the executive could determine the success or failure of the draft constitution. The draft proposes a popularly elected president as head of state with limited powers, and a prime minister, appointed as the head of the largest party or coalition in parliament, to serve as head of government and run day-to-day affairs through the cabinet. Though both sides agree in principle to a hybrid system, the division of power remains the main point of contention. For example, plans have been discussed which allocate defense and foreign affairs powers to the president with other cabinet agencies under the purview of the prime minister, though concrete proposals have not yet emerged.

¶17. (SBU) At this time, President Kibaki's PNU is pushing to retain a powerful, directly elected president as head of state and government. They propose a president with the authority to appoint and remove the prime minister who would run the day-to-day affairs

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of government. PNU believes that it is disadvantaged by the current constituency-based system and is adamant that the president be directly elected. The largest constituency in Kenya is roughly 18 times the size of the smallest, and most large constituencies are in PNU strongholds. This system puts them at a disadvantage as they have more voters casting ballots for a small number of MP's, thus losing ground in parliament. It is PNU's belief that they would receive a majority of votes in a one person-one vote system, and want to retain a powerful presidency that could operate with a mandate from the people. This proposal largely maintains the status quo of the Coalition Agreement reached in February, 2008, but with expanded presidential oversight of the prime minister. For further analysis of the PNU position, see Cable 2 in this series.

¶18. (SBU) Prime Minister Odinga's ODM prefers a strong prime minister elected from parliament. As the current constituency system benefits ODM, they would prefer to retain executive power in parliament, divided between the prime minister and a cabinet, with limited interference from the president. They are pushing for safeguards that would prevent the president or the prime minister from unseating each other unilaterally. Elements of a Mixed Member Proportional system, in which votes are cast for both a member of parliament and a preferred ruling party, could serve as a compromise position on the method of election if a deal can be reached on division of power. For further analysis of the ODM position, see Cable 3 in this series.

¶19. (SBU) Both ODM and PNU united to oppose a clause in the draft allowing for constituencies to recall their member of parliament before the expiration of a term. Independent commentators favor a recall provision, but it is not known whether the CoE will yield to the wishes of Parliament or push through their own recommendations. Legislation governing the drafting process is unclear regarding whether the CoE or Parliament has the upper hand to make changes on clauses in dispute.

¶110. (SBU) The parties are also discussing a devolution plan that would create two levels of local government, each with its own assembly and executive structure. There are calls from some in the PNU camp to retain the current Provincial Administration system in which decisions and budgetary control generally flow from the national government. Those in favor of granting expanded powers to local government acknowledge that creating executive and legislative functions in eight regions and 74 counties is cost-prohibitive. Community-based organizations are reporting that the devolution issue may resonate with voters more than any other.

ODM is more amenable to devolution, and PNU could face problems attracting marginalized communities if it pushes to retain the status quo. A compromise on a single level of local government with expanded powers is being discussed.

¶11. (SBU) The judiciary opposes a clause in the draft that forces all judges to retire or submit to a vetting mechanism before they can be reappointed. Judges are sensitive that other public service members do not have to submit to vetting, but public opinion favors any measures that would root out corruption. One judge told PolOff that many would accept a vetting mechanism if they did not have to resign first, amid fears that the already significant judicial backlog would become much worse if all judges had to be vetted and reappointed.

¶12. (SBU) The inclusion of the Kadhi's courts in the draft constitution could be a major point of contention at the time of a referendum. The provision maintains the use of the courts only for civil issues between Muslims, a system that has been in place in Kenya for over 40 years. However, some large Christian-based organizations are opposed to the inclusion of the courts, claiming the constitution should treat all religions equally. The Seventh Day Adventist church will not oppose the courts, while the Catholic church has struck a neutral tone. However the powerful National Council of Churches of Kenya and some Evangelical and Pentecostal groups have threatened to oppose the draft constitution if the clause on Kadhi's courts is not removed.

¶13. (SBU) To date, mainstream members of both parties accept the inclusion of the Kadhi's courts in the draft. Ultimately the issue is a zero-sum game that will depend on political calculations and the state of play at the time a referendum is called. Factions opposed to other issues in the draft could join anti-Kadhi's courts sentiment in order to rally religious communities to oppose a referendum.
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